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No. 79-179

In the
Supreme Court of the United States
OCTOBER TERM, 1979

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

BETTY OSWALD, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION OF GENERAL MOTORS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is General Motors Corporation estopped to petition this Court for review of the decision of the Court of Appeals?

2. Is the decision of the Court of Appeals on the issues raised by General Motors in conflict with other circuits, or inconsistent with the accepted and usual course of judicial proceedings?

STATEMENT OF THE CASE

A. Nature Of The Case

This is a class action brought in the United States District Court for the Northern District of Illinois, against defendant General Motors Corporation (hereinafter "GM") on behalf of purchasers of 1977 Oldsmobile automobiles who received such cars equipped, without their knowledge or consent, with drivetrains, engines, and other component parts which were not as warranted and which were provided by other divisions of GM. The trial court certified plaintiff's class as to the issue of liability only under the Magnuson-Moss Warranty Act, 15 U.S.C.A., Sections 2301-12 (1977 Supp.). The district court, solely for the purpose of partial settlement, later certified a settlement subclass consisting of only those class members who entered into written purchase orders for the 1977 Oldsmobile on or before April 10, 1977.

B. Prior Proceedings In This Case

On December 19, 1977, GM and Attorneys General from forty-four (44) states (now forty-eight [48]) tendered a proposed settlement to the district court, suggesting that it be approved so as to resolve the claims of the settlement subclass members. The district court conducted a fairness hearing and permitted presentation of objections to the proposed settlement advanced by certain plaintiffs (hereinafter "respondents") and their counsel. On July 17, 1978, the district court entered findings of fact and conclusions of law determining the settlement to be fair, and thereafter entered an order approving the subclass settlement.

On appeal, the Seventh Circuit unanimously reversed the order of the district court approving the subclass settlement. (*In Re General Motors Corporation Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979); Pet. App. 1a-85a) Section VI of the Opinion, "Directions on Remand", authorized the district court to consider the advisability of allowing GM to communicate the terms of the disapproved settlement offer to the individual members of the subclass. (594 F.2d at 1130; Pet. App. 77a-84a).

The decision of the Seventh Circuit was rendered on February 26, 1979. On March 7, 1979, before the case was remanded to the district court, GM presented the district court with a motion for the entry of an order allowing GM to communicate the settlement offer to subclass members, and to approve a form of "Notice of Offer to Settle Claims." (Resp. App. 1a-4a). This motion was continued generally when the district court was apprised of the fact that the case was still in the Court of Appeals.

In due course, respondents filed a petition for rehearing directed at Point VI of the Opinion of the Court of Appeals. Opposing counsel were ordered to respond to the petition, and it was subsequently denied on May 4, 1979. Efforts to stay the mandate in the Seventh Circuit and in this Court were denied.

Thereafter, GM's motion was brought for hearing on June 14 and July 5, 1979. On July 5, 1979, the district court entered an order approving communication of the offer to settle the subclass claims. The district court also denied respondents' counsel's motion to communicate with the subclass members informing them of their evaluation of the offer.

On July 23, 1979, respondents filed a notice of appeal from the district court's order of July 5, approving communication of the settlement offer, and also filed a petition for writ of mandamus seeking to vacate the district court's order. Efforts to stay transmittal of the offer in the district court and the Seventh Circuit failed, and the offer has now been transmitted.

On August 2, 1979 respondents filed a petition for writ of certiorari to review Point VI of the Opinion of the Seventh Circuit rendered on February 26, 1979, and to review the Court of Appeals' decision of July 26, 1979. That petition is Cause No. 79-176, now pending in this Court. On the same day GM filed a petition for writ of certiorari to review that part of the February 26 decision which reversed the district court's order approving the subclass settlement. Respondents present this brief in opposition to GM's petition.

STATEMENT OF FACTS

This action commenced on March 7, 1977, when Betty Oswald filed a complaint for injunctive relief in the circuit court of Cook County, Illinois, *Oswald* v. *General Motors Corp.*, No. 77 CH 1360. The *Oswald* complaint was the first legal action brought in the United States attempting to rescind the secret and unannounced switch of a Chevrolet engine for the celebrated Rocket V-8 in 1977 Oldsmobiles.

On March 11, 1977, the Honorable Raymond K. Berg granted the plaintiffs' motion for a national temporary restraining order, covering all states with the exception of Louisiana, holding that the public interest so outweighed the interests of the defendant that the Court, as guardian of the public interest, would require GM, *instanter*:

(1) to disclose the identity of all persons who had purchased Oldsmobiles with the substituted Chevrolet engines, and (2) to take steps to ensure that all future purchasers be fully informed of these substitutions prior to the time of sale.

The Illinois Attorney General filed his own action in the Circuit Court of Cook County, Illinois, *People of the State of Illinois ex rel. William J. Scott* v. *General Motors Corporation,* 77 CH 1386.

Before the cases could progress further, on March 18, 1977, the State of Illinois filed another case in the Northern District of Illinois, alleging violation of the federal Magnuson-Moss Warranty Act, *Scott* v. *General Motors,* 77 C 927.

Oswald followed *Scott* when the defendant removed the *Oswald* state case to the district court. Subsequently, *Miller* v. *General Motors,* 77 C 1436, was filed and all three actions were consolidated by the Honorable Frank McGarr. The multi-district panel thereafter transferred all pending cases to Judge McGarr, and the cause proceeded under the denomination. *In Re General Motors Corporation Engine Interchange Litigation.*

On December 19, 1977, the Illinois Attorney General, purporting to act in his capacity as one of the class representatives in the consolidated action, sought and obtained leave to suggest settlement of the class action. [The Attorney General's action in negotiating a settlement without the knowledge and consent of other counsel in the case was allegedly express violation of the district court's order.] A fairness hearing commenced on May 1 and concluded on May 25, 1978.

A memorandum, abstract of the fairness hearing, and offers of proof were filed by plaintiffs-objectors opposing the offer of settlement. A post-hearing brief and proposed findings of fact, conclusions of law and an order were filed by GM in support of the settlement. A post-hearing "statement" was filed by non-objecting plaintiffs in support of the settlement.

The district court, on July 17, 1978, entered findings of fact, conclusions of law and an order approving the settlement.

Respondents appealed to the Seventh Circuit from the order approving the settlement, which accepted the appeal under the "collateral order doctrine." The Seventh Circuit, by unanimous opinion included in the Appendix to the Petition, reversed the district court's approval of the settlement. *In Re General Motors Corp., supra.* The court concluded that the district court abused its discretion in approving the settlement, and cited several reasons for this conclusion. Among those reasons were:

> (1) the settlement negotiations excluded all private counsel, in probable violation of the district court's pretrial order (594 F.2d, at 1126; Pet. App. 51a);
>
> (2) the district court refused to permit discovery into the settlement negotiations despite considerable evidence that the negotiations prejudiced the interests of the subclass members. (*Id.,* at 1123-1133; Pet. App. 50a-54a);
>
> (3) the settlement abandoned the prosecution of the claims of post-April 10 class members (Id., at 1128; Pet. App. 57a);
>
> (4) the settlement improperly provided compensation for the proponent Attorneys General and certain private counsel ($360,000) (*Id.,* at 1129-31; Pet. App. 59a-60a);

claims (which included not only the "engine switch" but also the substitution of other component parts in the automobiles including the transmissions), failed to apply appropriate damage theories, and failed to consider the possibility of a recovery of punitive damages (*Id.*, at 1132, n. 44; Pet. App. 64a-66a);

(6) the district court failed to properly apply and allocate the burden of proof (*Id.*, at 1124, n. 20; Pet. App. 46a-47a);

(7) the settlement attempted to gain the release of subclass members' federal law claims without compensation (*Id.*, at 1133-1137; Pet. App. 67a-74a).

Notwithstanding the reversal of the district court's approval, Point VI of the Opinion, styled "Directions on Remand (*Id.*, at 77a-84a), authorized the district court, in the exercise of its discretion, to allow GM to communicate the terms of the disapproved settlement to the individual subclass members.

ARGUMENT

GENERAL MOTORS CORPORATION IS ESTOPPED TO PETITION THIS COURT FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS.

Under appropriate circumstances, the right to prosecute an appeal or to seek a writ of certiorari may be lost by waiver, or more explicitly, a party, by his acts or conduct, may be estopped to seek appellate review. See *United States* v. *Benedict,* 261 U.S. 294 (1923); *Matson* v. *Rhodes,* 174 Or. 550, 14a P.2d 974 (1944); 13 Cyc. Fed. Proc., Appeal and Review §58.34 (3d Ed. 1977); 14 C.J.S. Certiorari §52. Respondents submit that GM, by its actions in the district court, is estopped to petition this Court for review of the decision of the Seventh Circuit.

On March 7, 1979, after the decision of the Seventh Circuit was rendered, but before remand, GM presented the district court with a motion for leave to communicate the offer of settlement. Paragraph 2 of the Motion stated:

> 2. Despite General Motors' conviction that the procedures followed in approving the settlement and dismissal of the pre-April 11 subclass claims were proper and equitable, *General Motors has decided not to induce further delay in the communication of the settlement offer by petitioning for a rehearing en banc or for certiorari.* (Emphasis added.) (Resp. App. p. 1a)

In the proceedings before the district court on March 7, General Motors' counsel repeated GM's position regard-

ing further review of the decision of the Court of Appeals:

> It is a matter that the Court noted last summer, the matter had a considerable urgency to it. So General Motors has decided that if we can get the offer to communicate out to the purchasers, that is the most important thing, and if we can do that, we would then not at this time in any event plan to seek further appeals. (Tr. 3/7/79, Resp. App. 6a)

General Motors did persuade the district court to "get the offer . . . out to the purchasers," and before the ink was dry on the order allowing communication of the offer, GM filed this petition for writ of certiorari in this Court. General Motors should not be allowed to take such manifestly inconsistent actions. General Motors' statements before the district court were obviously intended to induce the court to grant its motion by impressing the court with the urgency of the motion and with GM's willingness to forego appellate review if the motion were granted. After the motion was granted, GM reversed its position and filed the instant petition. At no time during subsequent hearings was the district court or respondent's counsel informed that GM was preparing a petition to be filed in this Court, raising a strong inference that GM wanted the district court to act on the basis of the prior representations.

Respondents respectfully submit in the strongest possible terms that these inconsistent actions by GM raise an estoppel, preventing GM from seeking review in this Court. General Motors voluntarily adopted a "no appeal" position in order to induce the Seventh Circuit and the district court to grant its motion. After the motion was granted, GM reversed its position. The integrity of the

judicial process *demands* that parties not be allowed to mislead the court, and the petition of General Motors Corporation should therefore be summarily denied.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER CIRCUITS AND IS CONSISTENT WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

This Court's own reading of the opinion of the Seventh Circuit will show that GM's petition is frivolous. Respondents are dismayed to see a thoughtful, scholarly opinion tortured and twisted in an effort to obtain review in this Court.

A. The Court Of Appeals Applied Appropriate Legal Standards In Reviewing The District Court's Approval Of The Settlement.

There is no dispute as to the appropriate standard to be applied when reviewing a district court's approval of a class action settlement. That standard is abuse of discretion. See *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1070 (2d Cir. 1971), cert. denied 404 U.S. 871 (1972). There can also be no dispute that the Seventh Circuit applied this standard in reviewing the district court's order. We quote the following from the Opinion:

> In conclusion, we hold that the trial court abused its discretion by failing to undertake a careful examination of the conduct of the settlement negotiations and by preventing the plaintiff-objectors from showing that the negotiations prejudiced the best interests of the class. *In Re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1131 (7th Cir. 1979); Pet. App. 62a.

> [T]his court has declined to adopt *per se* rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions. This does not relieve us, however, of our duty to reverse the trial court's judgment when we are convinced that there has been a clear showing of an abuse of that discretion. On the facts of this case, the irregular conduct of the negotiations, the failure of the trial court to examine the irregularities thoroughly, and the evidence in the record indicating that the irregularities may have damaged the interests of the class convince us that such a clear showing has been made. *Id.*, at 1133; Pet. App. 67a.

A clearer enunciation and application of the abuse of discretion standard will never be found. General Motors has simply lifted out of context the Court's reference to "clear and convincing evidence" in an attempt to distort the clear holding of the Court. The full statement by the Court reads:

> Thus, although the proponents of any class settlement bear the burden of proof on the issue of fairness, [citation], *proponents who improperly negotiate a settlement* should bear the heavier burden of establishing fairness by clear and convincing evidence. 594 F.2d at 1126, no. 30 (emphasis added); Pet. App. 52a.

The Seventh Circuit recognized that the exclusion of private counsel from the negotiations severely hampered respondents' ability to ensure the fairness of the settlement. The Court's comment of a "clear and convincing evidence" burden was a response to the proponents' desire to have the settlement approved irrespective of the gross impropriety of the negotiating parties. The taint is such that the Court must be assured there is substantial evidence of fairness. The court exacted the stated standard of proof so as to be assured that GM would not profit from

its improper conduct. It was not intended as, nor is it, a *per se* rule in all class action settlements. In any event, further reading of note 30 discloses that "the trial court accepted the proposed settlement as *prima facie* fair and shifted to the objectors at least the burden of producing evidence disproving the fairness of the settlement." 594 F.2d at 1126, n. 30; Pet. App. 53a. Imposing the burden of production on the wrong party is clearly erroneous, and this alone would have required reversal.

The failure of the district court to properly apply and allocate the burden of proof was one of several factors cited by the Court of Appeals in finding that the trial court abused its discretion in approving the settlement. The Court of Appeals noted the following (and other) flaws in the approval of the settlement:

> (1) the inadequacy of the representation of the class during settlement negotiations (594 F.2d, at 1126; Pet. App. 51a);
>
> (2) the abandonment of the prosecution of the claims of post-April 10 class members (*Id.*, at 1128; Pet. App. 57a);
>
> (3) compensation of the proponent Attorneys General and private counsel (*Id.*, at 1129-31; Pet. App. 59a-60a);
>
> (4) the district court's misapprehension of the class claims, failure to apply appropriate damage theories, and refusal to consider the possibility of a recovery of punitive damages (*Id.*, at 1132, n. 44; Pet. App. 64a-66a).

The Seventh Circuit was thus confronted with a clear abuse of discretion. The Court applied the proper standard of review, and supported its conclusions with appropriate authority. Therefore, there is no basis for review by this Court.

B. The Court Of Appeals Properly Held That The District Court Abused Its Discretion In Refusing To Permit Discovery Into The Settlement Negotiations.

Another factor in the Seventh Circuit's decision was the failure of the district court to permit discovery into the settlement negotiations. Respondent's recognize that there is usually no discovery into settlement negotiations. Respondents, as well as the Seventh Circuit, also recognize that such discovery is usually unnecessary, as it is bizarre to think that class counsel have not participated in the negotiations. The Court concluded, again citing appropriate authority, that the conduct of settlement negotiations may be relevant to an examination of the fairness of a settlement. See, Manual for Complex Litigation, §1.46 at 53-54; *Developments in the Law-Class Actions,* 89 Harv. L. Rev. 1318, 1537-38 (1976). This is particularly true where the negotiations were unauthorized, improper, and conducted to the exclusion of all private counsel. The spectre of attorney-shopping and inadequate representation in these circumstances is simply too apparent to be ignored.

We note, with some amusement, General Motors' assertion that allowing discovery into settlement negotiations "might well have a chilling impact on the willingness of litigants to enter settlement negotiations." (Petition of General Motors, p. 11.) Given the gross improprieties of this settlement, not the least of which is the minimal consideration offered by GM, we would hope that GM is correct and that litigants in the future will be cognizant of its tactics. The Court answered this same assertion in its Opinion: "To the extent such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial

doubt on their fairness." (594 F.2d at 1124, n. 20; Pet. App. 46a). The Court perceived the unusual nature of the settlement negotiations in this case and held that *in this case* the failure to allow discovery into the negotiations was an abuse of discretion.

This holding is consistent with plain common sense, with the policies of Rule 23, and with the decisions of other circuits. Cf. *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30 (3d Cir. 1971), (unauthorized negotiations likely to prejudice class); *Girsh* v. *Jepsen*, 521 F.2d 153 (3d Cir. 1975) (objectors are adversaries of all proponents and are entitled to full discovery). There is no basis for a review of this holding by this Court.

C. The Seventh Circuit Properly Held That The Form Of The Settlement Was Improper.

General Motors' final contention is that "the court of appeals improperly held that a class action may not bind objecting class members." (Petition of General Motors, p. 12.) Even the most superficial reading of the Opinion should have disclosed to GM that this was not the holding of the court. In fact, the Court of Appeals explicitly agreed with every argument made by GM in its petition, *if* the argument was phrased in the abstract. (594 F.2d at 1134; Pet. App. 70a-71a). Only in the context of this particular settlement did the Court find GM's arguments inapplicable.

The Court correctly noted that the form of the settlement was unprecedented, and recognized the "offer" for what it was: a blatant attempt to gain the *uncompensated* release of the class members' federal claims. The district court, after declining jurisdiction over the state claims, obviously had no power to extinguish the class members' state law claims. (594 F.2d at 1134; Pet. App. 71a). How-

ever, in order to preserve their state law claims, the approved "offer" forced class members to forfeit their right to participate in the settlement of their federal law claims. If all class members had refused to release their state law claims, the more desirable Magnuson-Moss claims would have been "settled" without the payment of a single penny by GM. While GM would lead the Court to believe otherwise, the settlement in the case at bar is quite different than a typical class action settlement. (See 594 F.2d at 1135, n. 51; Pet. App. 72a). For this reason, the cases and authorities cited by GM are not relevant. The form of settlement was unprecedented, forcing a fundamentally unfair choice on class members. As approved by the district court, the "offer" would have extinguished the federal claims of objecting class members without compensation, thereby depriving them of their substantive rights to due process of law. The Court had no choice but to strike down this offensive settlement, and its decision need not be reviewed by this Court.

In summary, GM's petition demonstrates nothing other than its unwillingness or inability to confront the plain language of the Opinion. The Court simply has not held what GM asserts that it held. General Motors does not acknowledge the extremely unusual nature of the case. The Court was commendably sensitive to the unique problems created by the irregular settlement negotiations and the unprecedented form of the settlement. The Court refused to pigeonhole the case as a typical class action settlement, and reversed the order of the district court in order to protect its own processes, as well as the rights of the class members. The decision is harmonious with the decisions of other circuits and is consistent with the accepted and usual course of judicial proceedings. Therefore, the petition of General Motors Corporation should be denied.

CONCLUSION

For the reasons set out above, respondents respectfully submit that the petition of General Motors Corporation for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION

MDL DOCKET NO. 308

MOTION FOR LEAVE TO COMMUNICATE OFFER OF SETTLEMENT

General Motors Corporation moves the Court for leave to communicate an offer of settlement to class members who purchased their 1977 Oldsmobiles prior to April 11, 1977. A suggested form of Notice is attached for the Court's approval.

In support of this motion, General Motors states:

1. On July 17, 1978, this Court entered an Order approving a proposed settlement and dismissal of the claims of class members who purchased their 1977 Oldsmobiles prior to April 11, 1977. On February 26, 1979, the Seventh Circuit reversed that order in a lengthy opinion which nonetheless recommended "that the district court consider the advisability of permitting the communication [of the settlement offer] if GM decided to extend its offer to individual members of the class." [Slip Op., p. 56]

2. Despite General Motors' conviction that the procedures followed in approving the settlement and dismissal of the pre-April 11th sub-class claims were proper and equitable, General Motors has decided not to induce further delay in the communication of the settlement offer by petitioning for a rehearing *en banc* or for *certiorari.*

EXHIBIT B

3. Over a year has elapsed since the proposed settlement was first announced. During that time, the offer has received persistent, widespread publicity with attendant interest in when it would actually be made available to eligible purchasers. Numerous potential offerees have inquired and continue to inquire as to when they will receive the offer of settlement. As the Court of Appeals recognized, potential offerees "must be wondering whatever became of the $200.00 and the mechanical insurance policy each had been promised." [Slip Op., p. 57]

4. This Court has regarded the communication of the offer as a matter of urgency. General Motors shares that view and is anxious to extend the offer to eligible purchasers so that they can make their own decisions as to whether to accept it or not.

5. Under the Court of Appeals' decision, this Court has the discretion to allow the settlement offer to be communicated to eligible class members. If they accept the offer, their claims will be dismissed with prejudice; if they reject the offer, their claims would continue to be prosecuted in this litigation subject to whatever subsequent orders and dispositions may be determined to be appropriate.

> "The question thus presented is whether the trial court can approve the communication of the offer, despite our reversal of the court's order approving the settlement.
>
> We think that the trial court can. GM's offer to settle, if accepted by individual class members, would not amount to a settlement of the class action itself. Individual class members would be free to reject it and continue to have their interests represented in the federal class action." [Slip Op., pp. 51-52]
>
> • • •
>
> "Given the present posture of this litigation, however, we recommend that th district court consider the advisability of permitting the communication if

> GM decides to extend its offer to individual members of the class. This procedure would provide those class members who wish to settle the benefit of the settlement package already negotiated, minimize further litigation and discovery on issuse collateral to the merits of the Magnuson-Moss claim, [footnote omitted]and permit those who desire to prosecute their claims to do so." [Slip Op., p. 56]

6. The Court of Appeals has stated that, for the offer of settlement to be communicated, this Court "need only find that the proposed exchange provides each class member with a *meaningful* opportunity to obtain satisfaction of his claim" and to consider the "accuracy and completeness of the disclosure." [Slip Op., pp. 55, 56 n. 60]

7. The settlement terms which General Motors proposes to communicate are unchanged from those previously considered by this Court insofar as they relate to class members who individually decide to accept the offer. As noted, the Court of Appeals, with the precise settlement offer before it, specifically recommended that its communication to eligible class members be considered to "provide those class members who wish to settle the benefit of the settlement package already negotiated." [Slip Op., p. 56]

8. The proposed form of notice, attached to the motion, provides eligible class members with "sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle." [Slip Op., p. 54] Consequently, the proposed Notice constitutes an accurate and complete disclosure of the settlement offer.

For the foregoing reasons, General Motors should be granted leave to communicate the offer of settlement to eligible class members and the attached form of notice should be approved for that purpose.

/s/ Thomas A. Gottschalk

.....

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DATED: March 6, 1979

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:
GENERAL MOTORS CORPORATION
ENGINE INTERCHANGE LITIGATION

MDL No. 308

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Frank J. McGarr, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois on Wednesday the 7th day of March, 1979, at the hour of 10:00 o'clock a.m.

PRESENT:

Mr. Abraham N. Goldman
(105 West Adams Street, Room 2370
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Mr. Charles A. Boyle
(77 West Washington Street, Room 300
Chicago, Illinois 60602)
Mr. William J. Harte
(111 West Washington Street
Chicago, Illinois)
Mr. Lawrnce Walner
(221 North LaSalle Street, Room 1748
Chicago, Illinois 60601)
Mr. N. Gross
(33 North LaSalle St.
Chicago, Illinois)
and
Mr. Donald G. Mulack
(134 North LaSalle Street, Room 204
Chicago, Illinois 60602)
appeared on behalf of certain plaintiffs;
Kirkland & Ellis
(200 East Randolph Drive
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Mr. Thomas A. Gottschalk and
Mr. John T. Hickey, Jr.
and
Mr. Louis H. Lindeman, Jr.
(Office of General Counsel, General Motors Corp.,
Detroit, Michigan 48202)
appeared on behalf of the defendants.

The Clerk: MDL Docket No. 308. In regards to General Motors Corporation Engine Interchange case. Motion to continue date for filing. Motion for leave to communicate offer of settlement.

Mr. Gottschalk: Good morning, your Honor, Tom Gottschalk for the defendant General Motors.

We are presenting both motions that the Clerk has called to your Honor this morning. One is more procedural in nature asking for an indefinite continuance on filing the reply briefs on summary judgment motion, in light of the Court of Appeals decision, and the more important matter is General Motors' request to communicate the offer of settlement to individual class members.

As our motion recites, your Honor, this is a procedure which seems to have been contemplated rather explicitly by the Court of Appeals in its decision.

The Court: The Court of Appeals virtually told us how to do it.

Mr. Gottschalk: Yes, your Honor. General Motors has considered it, and as we stated in our motion we do not agree with the Court of Appeals, but that is neither here nor there. The problem we face is the fact that there are a number of individuals who have read through publicity and through the notices from this Court, that there is this offer of settlement. It has been extended to Buick Pontiac purchasers. It is a matter that the Court noted last summer, the matter had a considerably urgency to it. So General Motors has decided that if we can get the offer to communicate out to the purchasers, that is the most important thing, and if we can do that, we would then not at this time in any event plan to seek further appeals. But the matter is somewhat urgent, your Honor, and we wanted to come before you as soon as we could.

Now the Court of Appeals seems to recognize that the settlement package offers a meaningful consideration to the class and was primarily concerned about the neutrality and sufficiency of the notice to the class members. We have endeavored, your Honor, working with prior notices to formulate a notice that is as neutral and as full in its description as we can make it. We have tendered that and we would propose that if we could have a short schedule for hearing on this motion, in-

cluding objections, and alternative suggestions on the notice, we would like to get it out to the class as soon as possible.

Mr. Boyle: Your Honor, if I may, please.

The Court: Yes.

Mr. Boyle: As your Honor knows there has been considerable notoriety concerning this case, not only the Court of Appeals' decision of last Monday, which is now nine days old—the Attorney General has filed a motion with the Court of Appeals asking that the mandate issue immediately. Judge Wood, who is the author of the opinion of the Seventh Circuit, has entered an order upon those who wish to file a response to Attorney General Scott's motion to file the responses by today. While your Honor is intimately familiar with this case it is still in the Court of Appeals. The record is in the Court of Appeals. The motion with respect to the issuance of the mandate is in the Court of Appeals. Frankly, your Honor, we, meaning the plaintiff objectors, who have reversed your Honor's finding, are as anxious as anyone to see that the people of America, the Oldsmobile purchasers who paid nearly $920 million for what they thought were Oldsmobiles, will finally get some redress and some hearing.

The point is that I think that Mr. Gottschalk is premature in coming before your Honor because we intend in our response to Attorney General Scott's motion, to file a petition for rehearing relative to Point VI. And Point VI is why Mr. Gottschalk is here, namely the communication to the class members.

Now what your Honor doesn't know is the first time that we ever heard of such a vehicle, as sending a notice out via a defendant, was when Mr. Gottschalk was asked by Justice Fairchild relative to whether or not he thought that General Motors could communicate unilaterally to the class, there was an exchange and Mr. Gottschalk said—we have to take that up with GM—assuming whatever happens before your Honor.

The point of it is, your Honor, is that we are trying to move as expeditiously as possible and I would suggest to your Honor perhaps that at this time the jurisdiction of this Court, while it might soon be able to entertain such a motion, does not at this time have the matter before it because the mandate is not here and there is an order on all other parties to file whatever responsive pleading they are supposed to file by today. We are planning filing our petition for re-hearing relative to the issue that Mr. Gottschalk is here on as to whether or not General Motors can unilaterally communicate with the class after certification relative to its "Side of the story" without giving the consumers of America, namely the Oldsmobile purchasers, an opportunity to see that General Motors, to what extent it went to substitution of not only engine components, but frankly all components which were camouflaged with Oldsmobile bodies and manufactured in Chevrolet plants.

For that reason, your Honor, I would respectfully ask—

The Court: All right, on the issue of the timeliness of the motion, before Mr. Gottschalk responds, does anyone else have anything they want to say on it?

Mr. Mulack: The Attorney General would merely state, because of the massive publicity and public awareness of the potential offer that the Attorneys General throughout the country have received numerous inquires, as well as this Court receiving inquiries—the Clerk of the Court. I remind the parties that at the time the notice of appeal was originally filed, on your Honor's ruling, a motion was made by the Attorneys General for leave to start the mechanical procedure to communicate the offer to the sub-class members. Your Honor had indicated that you thought it was not a bad idea that if you had jurisdiction or you felt you had jurisdiction you would allow that procedure to go forward. The motion that the Attorney General filed in the Court of Appeals last Friday asked that the mandate return as soon as possible prior to the 21-day time limit so that we might merely

get into—like we are doing today—preliminary motions so that all parties may be heard as to their opinion on the decision that was rendered, and to start the mechanical procedures necessary to effecuate some form of a notice to the class members, which is there is no doubt in any parties' mind, the Court of Appeals said, may be communicated if General Motors so desires and may be communicated to the class members.

The Court: Whenever the mandate comes, soon or late, advanced or after 21 days, it does seem that I don't have jurisdiction until it comes.

Mr. Gottschalk—

Mr. Gottschalk: On that point, your Honor. This is not a case where a final judgment as such as entered by this Court and taken up to the Court of Appeals at which point jurisdiction is lost in the trial court. The general rule, and I'm sure the Court is aware of it, obviously is where an interlocutory order is appealled from. The trial court does not lose its jurisdiction over the cause. Now as the Court of Appeals indicated in its order, it treated the appeal as a Collateral Order Doctrine. Under the Collateral Order Doctrine. Under the Collateral Order Doctrine, which is analogous to an interlocutory order, and citing from Wright-Miller, the rule is that the District Court should have the same power to proceed as it enjoys pending, frankly, interlocutory appeals. When a collateral order is on appeal, and the citation is 15-Wright-Miller and Cooper, Section 3911, Page 497 of the 1976 edition. Similarily, there are cases, United States versus McDonald, 435 US 850, which while not precisely on that point, treats the Collateral Doctrine, the Order Doctrine, as permitting interlocutory appeals.

So our proposal is, as with any other interlocutory appeal, the trial court has jurisdiction to proceed on all phases of the case. Obviously we don't want to have the offer communicated to the class until the mandate is down. But this Court has jurisdiction just as it did

to hear our summary judgment and other phases of the case. To have the parties come before it, to review proposed forms of notice, consider adequacy. We would suggest waiting for the mandate to come down, when it does and at that point an order be entered directing the communication of this offer that would remove any possibility of a later collateral attack on that subject. But it seems to me as Mr. Mulack suggests there is no reason why we should incur any further delay, which very frankly, seems to me, underlies the strategy that has been revealed this morning by the plaintiff objectors, in going through the paperwork and hearing counsel out as to the adequacy of a notice, assuming the offer is to be communicated.

Mr. Boyle: Your Honor, first I would like Mr. Harte to respond to what Mr. Gottschalk just said.

Mr. Harte: If I may, your Honor.

First, in order of procedure, just the technical procedure, I believe the Court has entered a stay order, or did reflect that the matter be stayed, and it would have been I think the more appropriate procedure to come in before the Court and address the question of jurisdiction and the question of whether the Court would vacate the stay order.

Secondly, I would disagree with the recital of the law by Mr. Gottschalk, although I was not apprised of it. We felt that since the question of appeal addressed this very question, that is not seeded in the Appellate Court, it would seem more appropriate that the law relative to the divestment of jurisdiction in the District Court, and the seeding of the jurisdiction in the Appellate Tribunal would be applicable here. If they desired the Court, this Court to move with alacrity, they should have addressed that question to the Appellate Tribunal, and they have, they have with the request that there be an immediate issuance of the mandate. I think the more appropriate procedure is what Attorney General Scott has adopted, and that is to address this question to the

Appellate Court. It did that last week, and the Appellate Tribunal ought to do that. Now the Appellate Tribunal can do whatever it desires. We are going to make them aware today, in our response, to what General Motors desires to do before the District Court, and lay the question before the Appellate Tribunal.

The Court: Well, it is certainly easier to have them decide it in advance than to have me do something and have that appeal.

Mr. Walner: Your Honor, even though there may be important questions to ask the Court of Appeals to consider, or reconsider with regard to the general principle of submitting offers to a class and how it may impact on this or other class actions and possibly undermine certain aspects of the class action. I don't think it would be incompatable with things as they stand or with the expectation of things to be to proceed to draft notices that all parties would want to accompany such an offer, so that whenever the frame work is suited for acting it can be done so promptly.

The Court: Well, I have a motion for leave to communicate an offer of settlement and I have got the forms that General Motors desires to communicate. I don't suppose I am in violation of my duties to the Court of Appeals if I looked at it. I don't have to take any action on it until they assure me that I have jurisdiction.

Mr. Harte: We have no objection.

The Court: Which I understand will be done in a matter of a few days.

I must confess, I am a little surprised to find the parties in so soon. I had thought that we would wait until the mandate came down and I did that without reflecting on whether I had jurisdiction or not simply because that is what you routinely assume. But as long as the matter is in the court on the motion to shorten the time for the mandate to come down, the jurisdictional question is one that they will decide within a day or two,

as far as I know. If so, why should I decide it now, another day or two isn't going to make any difference.

I will take the notice of the offer to settle claims and study it and as soon as I am assured I have jurisdiction, or I will decide whether I will take jurisdiction or not if the Court of Appeals doesn't decide it within the next few days with whatever order they hand down, I will ask the parties to respond to this in a short time and consider whether the notice should go out, and if so in what form. I think all we are arguing about is whether we are going to do this next week or two or three weeks from now. That is about the size of it.

Mr. Gottschalk: Your Honor, I don't know whether we are talking about doing it next week or next month, frankly, in terms of the timing. I want to reassure the Court that nothing in our coming to court here this morning suggested that we were going to ask this Court to enter any orders affecting the class until the matter of jurisdiction was clear.

The Court: I understand that the whole issue is whether I should have jurisdiction to take cognizance of this motion, and whether I should ask for responses immediately.

Mr. Gottschalk: My concern, your Honor, in terms of timing, is that there are things that can be done in the next few weeks. Mr. Boyle has indicated this morning that they will petition for a re-hearing. Now if he does that, ordinarily the timing is fairly short, maybe a matter of three or four weeks before the Court of Appeals usually denies those petitions—

The Court: I have to interrupt you to indicate—or remind you that the matter he is petitioning for re-hearing on is the precise matter you rely on to give me authorization to send out this notice. So if the Court of Appeals takes that motion for re-hearing seriously, or the petition, I would certainly want to wait for them to decide it.

Mr. Gottschalk: We would concur with that, your Honor, insofar as again not sending notices out. But the only thing that is going to be decided by the motion that is currently pending before the Court is the request of whether the mandate ought to issue. Mr. Boyle is saying, don't issue the mandate because I finally filed for re-hearing. If the Court feels that is the reason to toll the mandate, then we will be in for a briefing process with the Court of Appeals and several weeks will go by.

The Court: If the Court says, which I assume they may very well, issue the mandate, then the whole problem is solved. If they don't issue the mandate they may give me some indication since I assume it will be discussed as part of some of the submissions to the Court, whether there is an appeals on the collateral issue, I have on-going jurisdiction, if they don't give me any indication on that I will take a look at the law and decide it myself. I would like to wait until the Court of Appeals responds to the motion now pending.

Why don't I enter this motion and continue it a few days until we hear what the Court of Appeals has done there.

Mr. Gottschalk: Your Honor, depending upon the result of that, we may bring the matter back before you on a subsequent motion.

The Court: I will enter this motion and continue if generally. You come back in a subsequent motion as soon as we know what the Court of Appeals has done on the first step of this process.

Mr. Gottschalk: That will be fine.

The Court: And on the motion of summary judgment —let's get that out of the way—General Motors' motion to continue the date for filing on the summary judgment pleading is granted, remind me to take that up again whenever it is certain that I resume jurisdiction of the matter.

Mr. Harte: Judge, is there any specific date on the response—I think their summary judgement motion—I don't think their summary judgment motion reply addresses itself to anything in the Court of Appeals. I assume that on the post-April 10th question the same issues are going to be—

The Court: I don't think anything is going to change on that. I have assumed that the reason for the delay on that is that you were all busily engaged in the Court of Appeals and trying to get this issue out of the way. But General Motors needs more time on that. I want to get this issue out of the way first too and see where we are going. We will fix the time for that the next time we meet. But in the meantime nobody is in default for a failure to plead to this on the summary judgment.

Mr. Gottschalk: Thank you very much, your Honor.

The Court: All right, you just agree and come in on whatever date the Court of Appeals has done something that I should know about.

Mr. Gottschalk: Thank you.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

In The
UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

IN THE MATTER OF:
GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION.

MDL No. 308

CERTIFICATE

I do hereby certify that the proceedings had in the above-entitled cause before the HONORABLE FRANK J. McGARR, one of the Judges of said Court, in his

courtroom, Chicago, Illinois, on Wednesday the 7th day of March, 1979, was recorded stenographically by me and thereafter reduced to typewriting under my direct and personal supervision and is a true an accurate transcript of said proceeding.

Anthony W. Lisanti
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

see

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